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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1966

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SYMONETTE SHIPYARDS, LTD.,

Petitioner,

vs.

LEE CLARK, and RUBY ZANNINO, as Administratrix of the Estate of Albert Zannino, deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The facts of the case are amply stated in the two opinions of the Court of Appeals and in the Findings of Fact entered by two District Judges, as set forth in the Petitioner's appendix. However, the most concise statement of facts appears in the opinion at 330 F.2d 554, as adopted in the opinion appealed from, as revised for currency:

Lee Clark, then a minor, and Albert Zannino were two of six men who were employees of one Wilson who had a contract to erect certain petroleum product tanks in Haiti. Wilson arranged for the transportation of the tanks together with the necessary equipment to be used in their erection on a landing craft owned by Symonette Shipyards, Ltd. As a part of the agreement of transportation Symonette, acting through its proper representative, agreed with Wilson to transport the six men with the understanding that in order to comply with the laws of the Bahamas the men would have to be signed on as if they were members of the crew, although it was agreed that they should perform no duties for the ship. This subterfuge was to obviate the penalty that the ship would be subjected to if it carried passengers, since under the Bahama regulations it was not permitted to land with passengers. Included in the equipment put on board was a large crane, which both Wilson and the ship's captain understood was to be used by Wilson's men, including Zannino and Clark, to unload the ship when it arrived at its destination. Following a stop at Nassau for the unloading of cargo, one Ryder, who had been designated by Wilson and the captain as being in charge of the Wilson group, caused several of his group to attach an additional length of boom to the boom of the crane. In order to do this it became necessary for the men to add length to the cables that held up the boom, which, of course, in turn held the cable that would be attached to the cargo for use. In order to lengthen this cable, the men, including Zannino and Clark, under Ryder's supervision, simply placed the ends of the two pieces of cable together and clamped them in a manner that a pull on either end of the cable would tend to cause them to separate. There was no loop made with the brackets or clamps fastened over the turned-back ends of the loop.

All concede, and the trial court found, that the splicing was done in a manner that no one knowing anything about such an operation would countenance. Thereafter, after the splice was tested by lifting against a cleat on the deck of the vessel, the crane was used to lift a hand truck. Zannino and Clerk were on the deck from which the truck had been lifted and when a part fell off of it they jumped under the truck to recover the part, at which time the splice parted, the boom fell on the two men, killing Zannino and injuring Clark.

The findings of fact forming the basis of the conclusion that the vessel was unseaworthy, was based upon facts proven by both sides:

> "The injury to the plaintiffs occurred as a result of a defective splicing of the pendant cable of a crane."
>
> . . . .
>
> "The Court finds that the pendant cable was spliced in a manner which the ordinary prudent person attempting to splice a cable would not make the splice. Such an act of splicing amounted to negligence."
>
> . . . .
>
> "By undisputed testimony it was shown that this manner of splicing the cable . . . . was clearly not proper or safe and that such a splice would not have been made by any one with any knowledge of splicing."

The jury in the first trial, by special verdict, Rule 39(c), F.R.C.P., as an advisory jury, found that Zannino and Clark were seamen, were members of the crew of the vessel, and were employed by Symonette Shipyards, Ltd.

At the first trial, recovery of general damages was denied on the ruling in the pleading stage that the men were not protected by the warranty of seaworthiness. This holding was reversed on appeal. 330 F.2d 554. Awards of maintenance and cure and funeral expenses were affirmed.

In a second trial, the vessel was found unseaworthy, the maritime law of the United States, statutory and general, was applied, Bahamian law was urged by the shipowner, but rejected on the double grounds of non-applicability and failure of adequate proof, and general damages were awarded, reduced for contributory negligence. These holdings were affirmed on appeal, and this petition for writ of certiorari is directed thereto.

ARGUMENT

I

The choice of law determination has not been shown to conflict with any holding of this Court or any other Circuit. Nor would the results be altered by application of other than American law as the findings of the Trial Court apply American law in two ways: as a substantive right, Jones Act, 46 U.S.C. 688, and as a matter of procedure by failure of proof of foreign law.

There does not seem to be any valid reason for this Court to now review the issue. The lower courts merely

followed the holding of this Court. **Lauritzen v. Larson,** 345 U.S. 571 (1953):

> ". . . . each nation has a legitimate interest that its nationals and inhabitants be not maimed or disabled from self-support."

Under Rule 44.1, F.R.C.P., (July 1, 1966), which was not in force at the time of trial, the findings on foreign law would be reviewable as a matter of law.

Under the new rule, the Petitioner's testimony that British maritime law precludes recovery for contributory negligence, would be cast aside as not consistent with the holding of this Court that the British maritime law is that of comparative negligence. **The Max Morris,** 137 U.S. 1 (1890).

The Trial Judge rejected the quality and quantum of proof offered by Petitioner. After all, Bahamian precedents were shown to depend upon the memory of practitioners of the bar rather than published reports, and its **stare decisis** is, at best, a hazardous guess. In the particular field at bar, there were no cases known to have ever been tried or decided. The Trial Judge consequently held that even if Bahamian Law were applicable, he could only presume it to be the same as American, as the testimony of law tendered by Petitioner was inadequate to sustain the burden of proof. This ruling is supported in the record and is not clearly erroneous. **McAllister v. United States,** 348 U.S. 19 (1954).

The Trial Judge followed settled rules governing choice of law, adopted by this Court at the inception of

the Republic, **The Amelia, 1 Cranch.** (U.S.) 1 (1801), per Mr. Chief Justice Marshall, and since reiterated. **Liverpool & Great Western Steam Co. v. Phenix Ins. Co.,** 129 U.S. 397 (1887); **The Scotland,** 105 U.S. 24, 29 (1881):

> "If a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what the law was. If not shown, we would apply our own law to the case."

As a substantive issue, the Trial Judge was correct in granting relief under American law, or, as this Court has held:

> "Why should it ever be held that what is a wrong when done to an American citizen, is right if the injured party be an Englishman?" **The Scotia,** 14 Wall. (U.S.). 170, 185 (1871).

An American employer of American citizens would be held liable in this cause. Why not a British employer of the same American seamen? Or, do our courts have the right to protect American citizens from maiming and death at sea, even though the tort-feasor be foreign. The answer is self-evident and has been affirmatively given by this Court, and no conflict is demonstrated.

II

Petitioner presents no grounds justifying review by this Court of the adjudication of liability, except that he seeks a fifth crack at the evidence.

In two trials and two reviews by the Court of Appeals, the unseaworthy condition was clearly established, and pursuant to well-established principles of admiralty law, the shipowner was charged with the breach of his absolute and non-delegable duty to furnish a seaworthy vessel. **Seas Shipping Co. v. Sieracki**, 328 U.S. 85 (1946).

The only reason given for the denial of damages in the first trial was the error in not permitting the two seamen the protection of the unseaworthiness doctrine, which was corrected by the Court of Appeals in the first appeal. **Clark v. Symonette Shipping Co.**, 330 F.2d 554.

By advisory special verdict in the first trial, Rule 39(c), F.R.C.P., the jury found that the two men, Zannino and Clark were seamen, having signed the shipping articles, were members of the crew of the vessel, and were employed by the shipowner, Symonette Shipping Co. On this advisory finding of fact, the Trial Judge adopted it as supported in record and not clearly erroneous.

Once the jury's findings were adopted, the error of refusing the men the protective cloak of the warranty of seaworthiness was self-evident.

As to Clark, regardless of any experience he had or did not have, the record is clear and uncontroverted, he just plain did not know what was done behind his back, and never did find out. He cannot be charged under any theory of law for the defective splice he did not make, and did not see being made.

Zannino, on the other hand, was found to have had some experience in cable splicing; his widow can no longer

test that finding. She does, however, and did, controvert the legal significance of that finding on the uncontroverted record, which is supported by the additional findings of fact, that her husband merely participated in carrying out the orders and specific directions of his designated superior, in creating the defective splice.

Mr. Zannino's experience as a shore-based boilermaker, with the incidental duties of cable-splicing, cost his widow and four minor children 25 per cent of their lost support, whereas no evidence was submitted that such experience was useful on board ship, or on a moving crane cable. He was charged 25 per cent fault for following his superior's orders, which he was bound to do by the universal law of the sea.

Petitioner has not demonstrated any conflict between the opinion below and that of any other Circuit.

Donovan v. Esso, 259 F.2d 65 (3rd Cir.), cert. denied, 359 U.S. 907 (1959), and **Pisano v. S.S. Benny Skou,** 346 F.2d. 993 (2nd Cir.), involved seamen who created the faulty conditions all by themselves, without knowledge or help of any other or superior person, performing tasks they were well-qualified to do Neither Donovan nor Pisano created the faulty conditions under the direct orders or specific instructions of a superior, as did Zannino (who was working at sea for the first time).

Waldron v. Moore-McCormack Lines, 356 F.2d 247 (2nd Cir.), is hardly in point. The statement cited by Petitioner is indicative of affirmance of the judgment rather than reversal, as Ryder's specific directions to Zannino were such as no reasonably prudent boss cable-

splicer should have given, and the faulty splice was admittedly seen by the master of the vessel prior to the accident, but he remained passive and mute.

Two other cases cited in the Petition do not conflict as they involved longshoremen injured by operational negligence of their employers and fellow-longshoremen, which negligence, in one case did not render the vessel, or any of its equipment or appurtenances unseaworthy, nor was the negligence chargeable to any employee of the shipowner; while in the other, the same court reached a contrary result. Freitas was relegated to his exclusive remedies under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. 905. **Freitas v. Pacific Atlantic S.S. Co.**, 218 F.2d 562 (9th Cir.); contra, **Blaissengill v. Waterman S.S. Co.**, 336 F.2d 367 (9th Cir.).

In **Blaissengill**, the Ninth Circuit rejected its earlier **Freitas** holding, and now holds, with all other circuits, that improvident use of otherwise fit appurtenances renders the vessel unseaworthy.

And again, the Ninth Circuit held, as affirmed by this Court, that latently defective equipment, brought aboard ship by an independent contractor, who thereafter, maintained complete control over it, renders the vessel unseaworthy—no matter how or by whom the defect was created. **Alaska S.S. Co. v. Petterson**, 347 U.S. 396 (1954), **affirming, per curiam**, 205 F.2d 478 (9th Cir. 1963). In the cause at bar, Zannino was killed and Clark injured by the conceded defective cable splice, created under the specific instructions and management of Ryder, and noted by the master.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted

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I hereby certify that a copy of Respondents' Brief in Opposition was served on W. F. Parker, Attorney for Petitioner, 516 Ingraham Building, Miami, Florida, 33131, this ____ day of April, 1967.

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